aside an irregular judgment *ex debito justitiae* it has always exercised a discretion as to costs and has imposed terms as a condition of the exercise of that discretion—a common term being that the defendant shall not bring any action. In the circumstances of the present case I feel that I should exercise my discretion in that way and take the course which was adopted by Bayley, J. in *Cash* v. *Wells*, 1 B. & A. 375. There will be an order for release in terms of the summons and if the first defendant consents not to bring any action for trespass or the wrongful seizure or the like, he will have his costs of the summons paid by the assignee. If he does not consent there will be no order as to costs.

Order refused.

Solicitors for the 1st defendant (Applicant) *Hogan & Ivens.*

Solicitor for plaintiff's assignee— *Ong Huck Lim.*

[CIVIL DISTRICT COURT JURISDICTION]
COLMAN, D.J.
[SUPREME COURT APPELLATE CIVIL JURISDICTION]
SHAW, C.J., and BARRETT-LENNARD, J.
March 5, 1925

CHOP CHYE HIN CHONG
Plaintiffs (Respondents)
vs.
NG YEOK SENG.....Defendant (Appellant)

[S'PORE DISTRICT COURT SUMMONS No. 337 of 1924]
[SINGAPORE CIVIL APPEAL No. 10 of 1924]

Damages for wrongful distress—Proof of malice—Civil Procedure Code, S. 724.

Where a writ of distress is regularly issued in pursuance of section 724 of the Civil Procedure Code, that is, where the Court or a Judge having upon the evidence considered the landlord entitled to recover arrears of rent due to him by seizure of the tenant's property and has ordered a writ of distress to be issued,

Held, by the Court of Appeal, reversing the decision of Colman, D.J., that an action by the tenant for damages for wrongful distress does not lie in the absence of proof of malice on the part of the landlord.

This was an action brought in the District Court in which the plaintiff claimed damages against the defendant for the wrongful seizure of the plaintiff's goods under a writ of distress which had been set aside. The distress had been set aside on the ground that it was in respect of 2 months' rent whereas only 1 month's rent was in arrear and the plaintiff had tendered the amount actually due.

The defendant counterclaimed for the rent then due to him.

The action was heard before Colman, D.J.,

Cur. Ad. Vult.

COLMAN, D. J.—I held that the name in which Plaintiff sued was immaterial the Chop and he being admittedly the same thing.

Distress was set aside by Clayton, Assistant District Judge, and his decision was unreviewed. As commonly happens, an action for damages followed in the Court of higher Jurisdiction and notes of the Assistant District Judge which did not show in what respect the distress was held wrongful were put in evidence to assist in assessment. It was uncertain whether the Assistant District Judge had found as a fact that the tenant had never agreed to pay rent in advance and had tendered the one month's rent due; or held as a matter of law that distraint for two months rent was wrongful where one month was due for rent accrued and one month's rent due as rent agreed to be paid in advance (*London and Westminster Loan Company* v. *London and North Western Railway*, (1893) 2 Q.B. 49; 62 L.J., Q.B. 376) on the principle often urged that an agreement to pay rent in advance is only a contractual obligation to deposit money as security before the rent actually accrues due at the end of the month, distress only lying for rent actually accrued. In these actions, there is in practice therefore something like a retrial in the District Court on the same facts. I assumed, however, that the distraint was wrongful on some judicially established ground.

Damages, therefore, had to be assessed on the basis that at any rate not more than one month's rent was due, whether this had been tendered or not. I inclined to the view that tender had not been proved, a question relevant as to proof of malice. The whole stock-in-trade was seized, stopping the business the causing great damage to a small tradesman. I think this was clearly excessive, and therefore actionable without proof of malice (*Halsbury*, Volume XI, Article 398).

I held that the interpleader rule that damages are not recoverable after a judicial interposition did not concern the law of distress, and ought not to be applied thereto, the interposition of the Court in such cases being only of a regulative and ministerial nature in fact mere *exparte* procedure which decided no issues. I agreed with Mr. Samy that there was no malice of the kind which in certain cases gives an action of tort for setting in motion a judicial officer or causing him to proceed. The decision in "*Surinam* v. *Letchmee*," so regularly quoted in this Court during distraint proceedings, and so extraordinary, was referred to by the defendant but he relied mainly on *Pridgeon* v. *Mellor and others*, (28 L.T.R. page 261) which I held inapplicable.

As regards rent I allowed $100/–; perhaps, too much, as the defendant by his own wrongful act prevented the premises from being used for the purpose for which he let them; but this side of the

case was not very fully urged. As regards damages, I assessed them as a jury at $175/–, it was the natural and contemplated consequences of the defendant's action that the Plaintiff's small business was very seriously injured.

Judgment for the plaintiff on the claim for $175/– and for the defendant on the counterclaim for $100/–.

The defendant appealed from the decision of the District Judge and his appeal was heard before Sir Walter Shaw, C.J., and Barrett-Lennard, J.

Sammy for the defendant-appellant.
Cooper for the plaintiff-respondent.

Cur. Ad. Vult.

SHAW, C. J.—The appellant, on the 29th December, 1923, applied to the District Judge under Chapter XXXIII of the Civil Procedure Code for a warrant of distress against the goods of the plaintiff who was his tenant of a portion of the premises No. 139 Beach Road.

The Affidavit stated that the sum of $100/–, being two months' rent was due.

The District Judge issued the warrant and goods of the Plaintiff, sufficient to satisfy the rent claimed, were seized under the warrant.

The Plaintiff, on the 2nd February, 1924, applied to set aside the distress on the ground that one month's rent only was due and, on the 9th February, 1924, the Assistant District Judge set aside the distress holding that one month's rent only was in arrear and, I imagine, accepting the Plaintiff's statement that he had tendered the amount actually due. The Plaintiff subsequently issued the summons from the decision on which the present appeal is brought, claiming damages for wrongful distress and the defendant counterclaimed for the rent then due.

The District Judge found that there was no malice on the part of the Defendant but considered that, as the distress was for an amount in excess of what was in fact due, an action lay against the defendant without proof of malice. He therefore entered judgment for the plaintiff for $175/– which he considered was the damage sustained by the plaintiff in consequence of the distress and gave judgment against him on the counter-claim for $100/– for the rent due. The defendant appeals from the judgment on the claim. Several points were taken on behalf of the defendant on the appeal but I need only deal with one which in my opinion concludes the matter.

The procedure for effecting a distress for rent in this Colony is entirely different from that which prevails in England.

In England a landlord has the right to seize the goods of his tenant on the demised premises for rent in arrear and does so without the intervention of the Court. Here he has no such right but has to proceed under Chapter XXXIII of the Civil Procedure Code and obtain an order for the issue of a warrant of distress which is directed to the Sheriff for execution.

It is a well established principle both with regard to civil and criminal matters that a person is not liable in damages for putting the law in motion unless he is actuated by malice. It is the right of everyone to put the law in motion if he does so with the honest intention of protecting his interests but it is an abuse of that right if he proceeds maliciously and without reasonable and probable cause for anticipating success. An example of this will be found in the difference that exists between an action for wrongful arrest and one for malicious prosecution. In the case of the first, where a man acts on his own initiative, proof of malice is not necessary to give a right to recompense by damages. In the case of the second, where the interposition of the Court is obtained, malice must be established. An example may again be found in the form of an action for abuse of ordinary civil process. Malice and absence of reasonable and probable cause must again be proved in the same manner as in an action for malicious prosecution (*Mitchell* v. *Jenkins*, 5 B. & Ad. 588). The case of wrongfully obtaining the issue of a writ of extent in England is perhaps as closely analogous to wrongfully obtaining the issue of a distress warrant under our law as can possibly be obtained. Authority to issue such a writ, which is a special remedy for the recovery of Crown debts, is obtained on application to the Court on affidavit very similar to the application for a distress warrant under our Civil Procedure Code. Although damages may be obtained for maliciously issuing such writ, (see *Craig* v. *Hasell*, 4 Q.B. 481) damages cannot be recovered for the mere wrongful issue of the writ without malice, (see *Pridgeon* v. *Mellor*, 28 T.L.R. 261) the reason being, as stated in the latter case, that there is a judicial determination interposed between filing of the affidavit on which the writ is issued and the issue of the writ, and the issue of the writ is in consequence of that interposition and therefore persons acting without malice are protected.

An example of the same principle will be found amongst the decisions of the Courts of this Colony in the case of *Surinam* v. *Letchimee*, 11 S.S.L.R. 87, where it was held that damages cannot be recovered for unlawfully seizing goods in execution after an order of the Court in an interpleader summons.

The District Judge having found that there was no malice in the present case, the defendant was entitled to have the plaintiff's claim dismissed.

I would therefore allow the appeal and direct judgment to be entered for the defendant on the claim and for $100–/ on the counterclaim both with costs.

The defendant is entitled to the costs of this appeal.

BARRETT-LENNARD, J.—In this case I greatly regret that we are constrained to differ from the District Judge. He says in his grounds of judgment, "I held that the interpleader rule that damages are not recoverable after a judicial interposition did not concern the law of distress, and ought not to be applied thereto, the interposition of the Court in such cases being only of a regulative and ministerial nature; in fact, mere *exparte* procedure which decided no issues." The last limb of this rather lengthy sentence is most manifestly wrong. *Ex parte* injunctions are frequently granted for a few days; and in this country the Courts, on occasions, and as part of their mesne process, pass *ex parte* Orders of Arrest and Attachment. The fact, therefore, that proceedings are not *inter partes* affords no foundation for the view that Orders obtained are to be regarded as ministerial in character. But the first two limbs of the sentence quoted undoubtedly conform to the law of England. My feeling of regret is due to the fact that the Legislative Council of this Colony has thought proper to depart somewhat from the common law, or rather the reading on the venerable Statute of Marlbridge, C.4. (See 2 Inst: 107). Of course, the object of the Legislative Council was to protect tenants against hard and grasping landlords. It has effected this, and other purposes, by the fasciculae of sections in the Civil Procedure Code which begin with No. 719 and conclude with No. 744. The really critical sections are 721 to 724 and I will treat them as read. I think they plainly shew that a judicial opinion and determination are interposed between the application for a distress and the grant of the necessary Writ. Such being the case the action given, or recognised, by the Statute of Marlbridge does not lie in this country unless there be proof of some indirect or improper motive on the part of the landlord who sets the law in motion. In my opinion this case is indistinguishable from *Pridgeon* v. *Mellor*, (28 T.L.R. 261). I think that in future a Judge ordering a Writ of Distress to issue may properly exact an undertaking from the applicant that he be answerable to the tenant for such damages as he may sustain if the distress shall be found by any Court of Justice to be excessive, unreasonable, or otherwise actionable according to the law administered in the Colony other than and except Section 724 of the Civil Procedure Code 1907.

Appeal allowed with costs.

Solicitor for the plaintiff (respondent)—
M. V. Pillai.

Solicitors for the defendant (appellant)—
Johannes & Sammy.

THE END OF THE STRAITS SETTLEMENTS OFFICIAL REPORTS.